

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Performance Measurements and Standards for)	
Unbundled Network Elements and)	CC Docket No. 01-318
Interconnection)	
)	
Performance Measurements and Reporting)	
Requirements for Operations Support)	CC Docket No. 98-56
Systems, Interconnection, and Operator)	
Services and Directory Assistance)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	
Petition of Association for Local)	
Telecommunications Services for Declaratory)	CC Docket Nos. 98-147, 96-98, 98-141
Ruling)	

COMMENTS OF BELLSOUTH

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COMMENTS

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries (“BellSouth”), hereby submits its comments in the above referenced proceeding.

I. INTRODUCTION AND SUMMARY

1. On November 19, 2001, the Commission released a *Notice of Proposed Rulemaking* to seek comment as to whether the Commission should adopt measurements and standards for evaluating incumbent local exchange carriers’ performance in the provisioning of facilities and services to competitive local exchange companies (“competitive LECs” or “CLECs”). Specifically, the Commission noted that any measurements or standards adopted must be “carefully designed to balance” the objective of ensuring that incumbent LECs

(“ILECs”) achieve a high level of service quality with the objective of minimizing the burdens imposed on these incumbents.¹ The Notice also states as important goals the harmonizing of state measurement plans with any national measurement plan and the potential streamlining of measurement plans by the adoption of national measurements and standards.²

2. There are three possible approaches to creating a federal measurement plan: 1) developing a mandatory federal plan, i.e., one that would supplant state plans, but that would be developed with appropriate state input; 2) creating a federal measurement plan that would serve as a model that states could choose to adopt, and which would embody policies that states would be encouraged to embrace, but that would not be mandatory; 3) leaving in place state plans and then layering on top of these the additional requirements of a mandatory federal plan.

3. Under the third alternative, there would be largely duplicative reporting on measurements (and possibly the payment of penalties) at both the state and federal level. This alternative would only add to the current state regulation in a way that is totally antithetical to the stated goals of the Notice, and, therefore, must be rejected. The first alternative is the most certain route to achieving the goals set forth in the Notice. The second alternative (an advisory plan) is an acceptable, but less effective, means to achieve the goals of the Notice.

4. As described herein, a number of the states in BellSouth’s region have devoted literally years to the process of developing measurement plans that have been adopted through specific orders entered for this purpose. Thus, there is no lack of performance measurement plans, at least in BellSouth’s region. To the contrary, the problem has been that the plans that have been adopted have so many measures (and submeasures) and are so complex, that the

¹ Notice, ¶ 7.

² Notice, ¶ 17.

benefits derived from these plans may be outweighed by the burdens they impose. Further, it would appear that the broad scope of these plans is largely unnecessary: in many cases the plans include measures that, once disaggregated for reporting purposes into specific submeasures, monitor performance at such a minute level that, for many submeasures, there is no activity to measure.

5. At the same time, three Commissions in BellSouth's region have adopted different plans. Georgia and Louisiana have adopted plans that are similar in many regards, but the Florida plan is markedly different. Given this, BellSouth is faced with the costly task of not just administering one complex plan, but administering multiple plans of considerable complexity.

6. Again, the worst possible result of this proceeding would be to leave state measurement plans in place while layering on top of these a federal plan. This approach would do nothing to bring about uniformity, since the differences in state plans would continue to exist, and it would do nothing to streamline the measurement process. To the contrary, this approach would only make the process more complex by adding additional, largely duplicative, measures onto those that already exist. The best alternative would be to have a mandatory federal plan that includes a streamlined set of measurements that would apply uniformly. This is the only alternative that will utilize the Commission's unique ability to set measurements and standards in the way that would be uniform throughout the country, and in a way that will appropriately streamline the applicable process.

7. If the Commission adopts this approach (as BellSouth advocates herein), every effort should be made to encourage full participation by the States in developing a national plan, particularly given the experience of many State Public Service Commissions in adopting and

administering performance measurement plans. BellSouth supports the creation of a joint federal-state task force for this purpose. Efforts must also be made to allow States that have adopted plans of their own to transition to the national plan in a reasonable timeframe with as little disruption as possible.

8. As to the enforcement of any mandatory federal plan, unquestionably certain statutory enforcement mechanisms are in place (e.g. actions pursuant to Sections 208, 503, and 272). In the event that a proceeding is brought against an incumbent on the basis of the criteria set forth in these statutory provisions, the fact that the incumbent has met any performance standards that are ordered by the Commission, or failed to meet them, could certainly be evidence in this proceeding. Moreover, the Commission could decide that performance measurement reporting, coupled with the prospect of an administrative proceeding pursuant to the above-noted statutory provisions, is sufficient to ensure compliance. However, if the Commission is inclined to utilize a penalty scheme to enforce specific compliance with the measurements and standards on an ongoing basis, it is necessary to design a new enforcement mechanism for this purpose. A workable approach would be to have automatic penalties for performance failures, rather than to attempt to go through the procedural requirements of the above-referenced existing mechanisms. At the same time, the Commission has no legal authority under the existing statutory provisions to impose penalties that would apply automatically. Thus, this approach could only be taken with the consent of the ILECs. BellSouth will agree to the imposition of automatic penalties, provided they are reasonable, and do not duplicate penalties in the states. BellSouth believes that other incumbent LECs would be willing to agree to reasonable penalties as well. Finally, the measurement plans and enforcement mechanism should apply to all carriers, to the full extent legally possible.

9. As to measurements: BellSouth believes that the measurements proposed in the Notice are generally appropriate, both in the number of measurements and in what they are designed to measure. As to the former, it is extremely important to develop a plan of an appropriate size. In BellSouth's experience, the state ordered plans have tended to be overly granular in attempting to capture every conceivable area in which there may be measurable performance. The result of this broad approach has been plans that are extensive and complex and, as a result of this complexity, are difficult to administer. BellSouth believes that in the development of the national plan, a different approach should be taken. Specifically, the Commission should begin with a relatively small number of measurements, which would measure performance in key areas that have the most impact on competitive LECs and their customers. Measurements should be added to this initial set only if there is a demonstrated need. Again, BellSouth believes that the approach in the *Notice* of utilizing approximately twelve measures as a starting point is appropriate in this regard.

10. As to the specific measures, BellSouth believes that ten of the twelve measures proposed by the Commission are appropriate. These measurements are very similar to measures adopted in a number of states in BellSouth's region. BellSouth, however, believes that two of the proposed provisioning measures, *Percentage on Time Performance* and *Average Delay Days On Missed Installation Orders* are not necessary because they would capture information that will be captured by other measures. Also, BellSouth proposes the addition of two measures that are not addressed in the *Notice*, *Order Completion Interval* and *Service Order Accuracy*.

11. It is, of course, extremely important to also set appropriate standards to apply to the selected measurements. The criteria for determining the appropriate type of standard has been clearly set forth by this Commission. Specifically, if a retail analog exists, it should be

utilized to detect any discriminatory treatment. If no retail analog exists, then a benchmark is appropriate. In almost every instance, there is a retail analog for the measurements proposed in the *Notice*. For this reason, BellSouth advocates that retail analogs be utilized in these instances rather than benchmarks.

As to the other issues raised in the *Notice*:

12. Data Validation: BellSouth agrees that meaningful measurements must be supported by valid, accurate and reproducible data. BellSouth believes that the data validation process in BellSouth's plan, which was developed in large part by State Commissions in BellSouth's region, achieves this goal and should be adopted by the Commission as part of the national plan.

13. Audits: BellSouth believes that appropriate audit procedures should be adopted. Specifically, there should be a comprehensive annual third party audit of aggregate level reports for ILECs and for CLECs. An annual audit will provide an efficient means to resolve all appropriate issues that may arise during the course of each year.

14. Workshops: BellSouth does not believe that workshops can be used to achieve a consensus among participating parties as to all aspects of an appropriate national plan. Instead, workshops must have a more limited role. Specifically, workshops could be utilized for parties to make presentations to address specific concerns of the Commission Staff, and workshops would be appropriate to seek input from State Commissions. Also, after an Order is entered, workshops might also be useful (at least limited workshops that take place over a brief, defined time period) to discuss implementation issues.

15. Periodic Review and Sunset: BellSouth believes that it is appropriate to have periodic reviews to address specific problems that may arise once implementation of the plan

occurs. Periodic reviews should not be used as a means for parties to argue for wholesale changes in the plan, particularly if this argument is merely a restatement of previous positions that the Commission has declined to adopt in creating a plan. Periodic reviews should be held no more frequently than once a year. At the same time, BellSouth believes it would be appropriate to delegate authority to the Common Carrier Bureau to address specific plan-related issues that are in need of remedy in between periodic reviews. The periodic reviews, set at appropriate intervals, should continue throughout the life of the plan.

16. As to the life of the plan, BellSouth believes that it is appropriate for both resold services and unbundled network elements to be removed from the coverage of the measurement plan when they become competitive. As to the plan in general, sunset of the entire plan should occur on a date certain, between one and three years after plan implementation.

17. Reporting: Again, BellSouth believes that the measures proposed in the *Notice* represent an effort to size the plan in an appropriate manner. Data should be collected by the incumbent LECs on the performance areas to which these measurements apply. At the same time, data collection will be an expensive process, and BellSouth would certainly welcome any ruling by this Commission that would reduce this expense. Clearly, a significant reduction would occur if a uniform mandatory set of measurements were adopted. This would allow for streamlined reporting according to nationally applicable criteria, as opposed to the piecemeal reporting that is currently required as a result of orders from various State Commissions.

18. Performance Evaluation and Statistical Issues: BellSouth believes that in order to provide a direct and reliable comparison of ILEC performance to CLECs (and to compare ILECs to one another) a uniform national statistical methodology is needed. For the reasons set forth

herein, BellSouth proposes the use of the modified Z test for the measurement plan, and the use of the truncated Z test for any automatic penalty plan that may be adopted.

II. THE DEVELOPMENT OF A NATIONAL PERFORMANCE MEASUREMENT PLAN

A. State Proceedings

19. Any effort to develop national performance measurements and standards must be placed in the context of what has transpired in the States. The Commission is obviously mindful of the efforts of State regulators. In fact, the *Notice* specifically acknowledges the value of the work by State Commissions and expresses the intention to “build on the States pioneering efforts.”³ In the nine states in which BellSouth provides local service, these efforts have been considerable.

20. To date, five State Commissions in BellSouth’s region have entered Orders adopting performance measurements. Georgia was the first Commission in BellSouth’s region to address performance measures. In October 1997, the Georgia Commission opened Docket 7892-U to obtain input from the industry on various issues relating to performance measurements for BellSouth. The Georgia Commission subsequently entered an Order in May of 1998, which established 19 performance measures, imposed performance reporting obligations, and established a dispute resolution process for issues relating to performance measurements. In June 2000 the Georgia Commission initiated a second phase of Docket 7892-U to refine BellSouth’s performance measurements, which culminated in an Order entered in January 2001 that adopted additional measures and established a comprehensive enforcement

³ *Notice*, ¶ 15

plan. The Georgia Commission is currently in the process of conducting a periodic review of the performance measurements and enforcement plan, as provided for in its January 2001 Order.

21. Likewise, the Louisiana Commission opened a docket to address performance measures, and issued an order establishing a comprehensive set of measurements, including an expedited dispute resolution procedure and audit rights in the Fall of 1998 (Docket No. U-22252, Subdocket C). The Order also ordered further workshops to be conducted to address (1) refinement and clarification of the metrics (2) an appropriate statistical methodology (3) establishment of appropriate benchmarks and retail analogs and (4) consideration of a self-executing enforcement plan. Nine multi-day workshops were held by the Commission's Staff, and a Final Order was entered May 14, 2001. In that Order, the Louisiana Commission clarified existing measures, added numerous new measures, established rigorous benchmarks and retail analogs based on the record in other state proceedings, and established a stringent self-executing enforcement plan. The Order also called for a 6 month review of the measures and the remedies. The Louisiana Commission has commenced that review, and has already had two workshops with another scheduled. Also, the Florida Commission initiated a performance measurement docket in early 2000, and entered a Final Order on September 10, 2001 (Order No. PSC-01-1819-FOF-TP). The Florida Order required the creation and implementation of a penalty plan that is a hybrid of the plans proposed by the various parties to the proceeding. BellSouth has submitted a proposal to implement the requirements of the Order. Both the Kentucky and Mississippi Commissions have also entered orders on performance measurements and enforcement mechanisms.

22. The fact that the other four states in BellSouth's region have not adopted a plan does not reflect a lack of attention to the issue. To the contrary, all have opened dockets and all

have held hearings. Further, to give but one example of their labor, the North Carolina proceeding included more than a year of collaborative Industry Task Force meetings prior to the hearing in June of 2001.

23. Therefore, to the extent the Commission is contemplating the creation of a national standard for Performance Measures to fill a regulatory void in this area, BellSouth can attest to the fact that no such void exists, at least not in BellSouth's region. To the contrary, each of the Commissions of the nine states in which BellSouth provides service has labored diligently to develop performance measurement plans, and – in some cases – has done so for years.

24. At the same time, the development of performance measurements on a state by state basis has given rise to two serious problems: (1) the plans that have been ordered are complex and difficult to administer; (2) there is a lack of consistency between some of the plans that have been ordered that compounds this administrative difficulty, and which has the potential to ultimately make administrative problems overwhelming.

B. Harmonizing State and Federal Plans: The Need For A National Plan

25. In creating an appropriate performance measurement plan, it is necessary to balance thoroughness with practicality. If a plan is not thorough enough, critical areas of performance will remain unaddressed. However, if the balance tips too far in the other direction, the result will be a plan that deals exhaustively with performance measurements, but entails the monitoring and reporting of so much information that it can not practically be implemented and maintained. The States in BellSouth's region that have adopted plans have made laudable efforts to consider input from all segments of the industry as to the measurements that are necessary. This approach, however, has resulted in plans that take an expansive approach to the task of

developing measurements. BellSouth has come to believe that these plans tilt too far in the direction of thoroughness, and that streamlining is necessary to restore an appropriate balance.

26. In each of the nine states, BellSouth has advocated a plan that includes Service Quality Measurements (“SQM”) and Self-Effectuating Enforcement Mechanisms (“SEEM”). As proposed in a number of states during recent performance measurement proceedings, BellSouth’s SQM is an exhaustive plan that contains 68 measurements and 2 informational reports.

BellSouth also proposed to desegregate the measures for reporting purposes by criteria such as methods of order submission, products ordered, activity type and volume. The results are approximately 1200 sub-metrics, each of which represents an area of BellSouth’s performance that is monitored and judged. Further, the system BellSouth has designed to collect, process and report the necessary performance data requires the retention of (and ability to access) a staggering amount of information. Specifically, BellSouth’s performance measurement Analysis Platform (PMAP) processes, at a minimum, the equivalent of 55 million pages of information every month, and the total database has the equivalent of 1.25 billion pages of text documents.

27. BellSouth, however, did not begin with a plan of such complexity. In the Georgia proceeding referenced above, BellSouth proposed in testimony filed in 1997 a plan that included 9 measures, disaggregated into 54 submeasures. Thus, BellSouth began with a plan similar in size to the proposal in the *Notice*. In the first Order entered in May 1998, the Georgia Commission increased the number of required measurements, and BellSouth’s proposal incorporated these additional measures. Over the course of the next two years, the number of measurements in BellSouth’s SQM increased even more in response to the requests of competitive LECs, agreements reached in various State Commission-supervised workshops, the suggestions of third party auditors, State Commission Orders, and BellSouth’s interpretation of

Orders by this Commission in response to 271 applications by the RBOCs. The result is a massive plan, the administration of which has, at times, proven to be daunting. Still, the labor inherent in administering a single BellSouth-proposed plan is substantially less than the labor involved in administering the numerous plans that have been ordered throughout the BellSouth region.

28. In the state proceedings, the Competitive LECs have advocated extremely complex plans that would have entailed the monitoring and reporting of hundreds of thousands of sub metrics.⁴ In many cases, in an effort to reach a compromise, State Commissions have added measurements or additional levels of disaggregation to BellSouth's SQM. The results have been as follow:

<u>State</u>	<u>Measures</u>	<u>Submeasures</u>
Georgia	74	2,337
Florida	70	2,143
Louisiana	66	13,521

29. Further, each State that has ordered a plan, has ordered a different plan. The Florida and Georgia Commissions took a similar approach to the disaggregation of measures, yet their respective orders differ enough so that the Georgia plan has almost 200 submeasures more than the Florida plan. The Louisiana plan, although very similar to the Georgia plan in many respects, included the disaggregation of measurements into ten different geographic areas, which resulted in a plan with more than 10,000 submeasures.

⁴ As BellSouth's witness David A. Coon testified in the Tennessee proceeding, the CLEC proposed plan, although unclear, appeared to contain 93 measurements, along with a disaggregation plan that, amazingly, would yield almost 400,000 sub metrics.

30. Moreover, even when State Commissions have ordered the same measures and submeasures, they have often ordered different standards, both retail analogs and benchmarks. To illustrate, benchmarks have been ordered by at least one of the three Commissions mentioned above for forty-three different measurements. However, there are only thirteen measurements for which all three have ordered a benchmark (as opposed to a retail analog) and have also set the same benchmark. In other words, even when these Commissions' orders have been consistent as to the measure and the type of standard, there is still only limited consistency in the decisions as to how high the standard should be set.

31. This inconsistency is not limited to performance plans, but rather extends to enforcement plans as well. Both Georgia and Louisiana essentially adopted BellSouth's proposed enforcement mechanism structure, albeit with certain modifications. Florida, however, declined to adopt a plan advocated by any party. Instead, the Florida Commission ordered that certain identified criteria would be utilized to develop an entirely new enforcement system. Thus, in addition to having numerous plans to administer, BellSouth will also have at least two entirely different penalty plans.

32. Moreover, the differences described above are only a fraction of what could develop as more states adopt performance plans. Although variations from state to state may not be extreme, the fact remains that different states have tended to order different plans. Extrapolating this experience to national parameters, there is a possibility that, without a national plan, the result will ultimately be fifty different plans, with at least somewhat differing measurements, standards and enforcement mechanisms.

33. Further, based on the experience that has been gained upon the implementation of these plans, it would appear that these complex (and differing) plans are going largely unused.

For example, for the five month period, June 2001 through October 2001, 38% of the more than 2,000 submetrics reported in Georgia had no CLEC activity whatsoever. This means that for almost 40% of the measures, there was no CLEC activity for a five month period. Further, even the submeasures that did have CLEC activity often had extremely low volumes. It is noteworthy that this paucity of measurable events occurred in the State that contains the largest city in BellSouth's region, and which has a great deal of competitive CLEC activity. Given this, the only conclusion is that BellSouth has employed hundreds of employees and spent millions of dollars to create a system that measures performance at such an extreme level of granularity that, on a category by category basis, there is frequently no performance to measure.

34. The lack of consistency in the performance measurement plans adopted thus far by State Commissions is regrettable. The systems that performance measurements are designed to monitor and report upon are regional in nature. From the standpoint of efficiently monitoring the performance of these systems, regional uniformity is the only approach that makes sense. To the extent that states stray in the future from adopting plans consistent with those in other states, the effectiveness and efficiency of the system will be negatively affected each time. The worst case scenario would be the adoption of nine different plans by nine different states.

35. The task of administering a plan as complex as BellSouth's SQM is, under the best of circumstances, daunting. To develop and administer on an ongoing basis multiple versions of the plan (or entirely different plans) based upon the judgments of numerous State Commissions will, BellSouth fears, be almost impossible. Thus, BellSouth believes that the better alternative is to set a national plan.

36. Developing a national plan is the only approach that will yield consistency and allow for movement toward more appropriately streamlined measurements. Moreover, the

requirements of the Act are uniform. That is, they do not vary from state to state. Accordingly, the development of measurements to monitor compliance with the applicable aspects of the Act should also be uniform. Thus, from a policy standpoint, a national standard is also appropriate.

37. Again, BellSouth believes that uniformity of measures is a paramount goal, both as a matter of policy and as a practical matter. This uniformity can only be achieved if a national plan is put in place. Thus, the need for a national plan is clear. The more difficult question is how the national plan should apply. Although there are two viable approaches that will be discussed below, there is one approach that the Commission must reject: there should not, under any circumstances, be a mandatory federal performance measurement or enforcement plan that would simply be layered over the existing state plans. The *Notice* makes repeated references to the goals of streamlining reporting requirements and reducing regulatory burdens on incumbents. An overlay of a national plan upon existing states plans would be antithetical to these goals. Such an overlay would do nothing to ensure uniformity, because differences that exist from state to state would continue to exist. The only result of this approach would be an additional layer of regulation, along with the attendant labor necessary to build the systems to implement this additional regulatory layer. Further, as will be discussed in greater detail below, State Commissions in BellSouth's region have already adopted measurements that are almost identical to ten of the twelve measurements that are described in the *Notice*. Thus, adopting a mandatory federal plan in addition to whatever plans states may have in place would simply result in a duplication of reporting requirements, and perhaps of penalties as well.

38. Having stated the firm belief that state and federal plans must not apply simultaneously, BellSouth acknowledges that the decision the Commission must make is a difficult one. The Commission should either adopt a federal plan that replaces all state plans, or

it should allow State Commissions to continue to adopt state plans as they deem appropriate, in which case any federal plan would be no more than advisory. Given these choices, BellSouth reluctantly recommends that the Commission develop a national plan that will apply instead of the state-ordered plans. This approach may seem somewhat harsh in that it would necessarily undo at least some of the labor performed by many states. However, not setting a mandatory national plan would necessarily mean incumbents would have the continued burden and inefficiency that inheres in having complex state-ordered plans that vary markedly from state to state.

39. At the same time, the Commission should pursue the development of a mandatory national plan by making full use of the commendable efforts that have been made to date by the various State Commissions. An approach should be taken to allow any state Commission that wishes to participate in the development of a national standard to do so as fully as possible, and to provide the Commission with the benefit of its (in some cases, extensive) experience in the development of measurement plans. To this end, BellSouth proposes the creation of a joint, federal-state task force to develop the national plan. As the *Notice* properly observes “state efforts have been instrumental in evolving and documenting incumbent LEC performance.”⁵ Virtually all that we now know about the proper structure of a measurement plan has resulted from the efforts of State Commissions. The “pioneering efforts”⁶ of these Commissions, and the plans they have implemented, allow us to determine which aspects of a performance plan are most effective, and which are less so. It is crucially important to involve State Commissions as fully as possible in the creation of a national plan, so that the structure of the plan may be

⁵ *Notice*, ¶ 15.

⁶ *Notice*, ¶ 15.

informed by their experience in this area. Thus, a task force should be created in order to ensure that the development of a national plan represents a collaborative effort between state and federal regulators.

40. Moreover, the national plan must be implemented in a way that accommodates the efforts of State Commissions and the decisions that they have made. BellSouth recommends that the national plan be implemented immediately after its development is complete in only the states that do not have an existing plan. All states that currently have a plan in place should be given a reasonable amount of time (to be determined by the Commission with input from the federal-state task force) to manage the adoption of the national plan, and the transition to the national plan from the current, state-ordered plan. This approach would allow State Commissions the discretion to transition to the national plan in the way that they deem most appropriate.

41. An acceptable, although clearly less desirable, alternative to setting a mandatory national standard would be to approach the development of national performance measurements in a way that would allow State plans to remain in place. In this case, the inconsistencies described above would remain, but – assuming the federal plan is not mandatory -- they would at least not be accompanied by an additional layer of essentially duplicative regulation. In this case, any federally developed guidelines would function in a fairly limited manner. Specifically, to the extent that a state has not set performance measurements, and does not intend to do so (i.e., circumstances that do not apply in BellSouth's region), the state would have the option of selecting the federally-developed plan. Likewise, even if a state had set performance measurements, it would have the option of adopting the federal measures in place of those it had

previously adopted. Thus, if, for example, a state determines that the plan it has ordered is too complex, then it could opt for the more streamlined federal plan.⁷

42. Also, the federal plan would be available as a model to which states could be urged to migrate. The performance measurement plans that have been adopted, both in BellSouth's region and throughout the country, almost uniformly contain provisions for periodic review. The existence of a federal plan would provide a sort of template that states could utilize during these periodic reviews to move toward the national model. Although this approach would undoubtedly be somewhat useful as a means to achieve greater uniformity, given the voluntary nature of this approach, it is likely to involve the continuation of significant variations in plans from states to states. For this reason, having a mandatory federal plan to replace state plans is preferable.

C. Enforcement Issues

43. The *Notice* appears to generally contemplate two possible approaches to enforcement: (1) using the existing enforcement mechanisms (e.g., Sections 208, 271 and 503(d)) of the Act) to enforce the measurement plan selected by the Commission; (2) creating a penalty plan specifically for use with the measurement plan.

44. The first alternative, using the existing enforcement structure, will only work to a certain extent. The federal enforcement mechanisms that currently exist are designed to address substantial violations of statutes, commission rules, and orders, and to address these violations with equally substantial penalties. Using Section 503 as an example, this section provides for the payment of a forfeiture penalty only when the subject violation of a Commission Order, Rule,

⁷ Assuming the Commission ultimately adopts a plan that includes the twelve measurements listed in the *Notice*.

etc. is either willful or repeated.⁸ Further, a finding that such a violation has occurred could only take place after an appropriate hearing before an administrative judge.⁹ Finally, if such a violation is found, the penalty for a single violation can be as much as 1.2 million dollars.¹⁰

45. If a national performance plan is ordered, compliance, or failure to comply, over a period of time could certainly constitute evidence in proceedings brought under Sections 208, 271, or 503. Further, the Commission could supportably reach the conclusion that using these mechanisms to address recurring or systemic failures is all that is required at this time. If, however, the Commission deems it appropriate to utilize a mechanism to ensure compliance with the plan on an ongoing basis, as distinguished from utilizing the existing mechanisms to address substantial or recurring plan violations, then it is necessary to create an enforcement mechanism for this purpose. In other words, a new approach would be needed because the existing mechanisms cannot feasibly be used for this purpose.

46. For example, applying the provisions of §503 to a hypothetical violation of a given performance measure demonstrates how unwieldy this enforcement scheme would be if used to address ongoing performance measurement issues. Assume, for example, that a particular measurement is designed so that compliance requires an incumbent to meet a given interval 90% of the time for each CLEC in each month. Performance at the 89% level would, in this hypothetical, constitute a failure. However, a single failure would not be the sort of “repeated” violation contemplated by Section 503. Absent the existence of other evidence, one would be hard pressed to argue that this slight deviation from the 90% standard constitutes a willful failure. Further, it is doubtful that the Commission (or for that matter, an individual or

⁸ 47 U.S.C. § 503 (b)(1)(B).

⁹ 47 U.S.C. 503 (b)(3)(A).

¹⁰ *Notice*, footnote 36.

company filing a complaint pursuant to Section 208), would wish to dedicate the necessary resources to pursue an action to address such a minor violation. Finally, in the remote event that this minor failure is determined to be a violation of Section 503, imposing the statutory maximum of 1.2 million dollars would clearly be excessive. If this approach were taken, then an incumbent could provide substantially compliant performance, when considering all measures, but still be penalized millions of dollars in a given month.

47. An appropriate performance plan must measure thoroughly and completely the performance of the company in question. This plan necessarily requires judgments of compliance or failure that are ongoing, and that detects failures of both large and small magnitude. Assuming that this plan is the subject of a Commission rule, performance violations could be subject to penalties. However, assessing penalties for a minor failure under the performance plan by using an enforcement mechanism that is designed to levy substantial penalties for willful and repeated violations of Commission rules is clearly not appropriate.

48. Having said this, BellSouth would also note that having measurements for diagnostic purposes, coupled with statutory enforcement powers to address major violations may well be sufficient, without having specific penalties associated with any failure to perform. In fact, BellSouth submits that, in the long run, this will be the most appropriate approach. As facilities-based competition becomes more prevalent and competitive alternatives increase, the market place will ensure that all carriers, including both incumbent LECs and other providers of facilities, will have ample marketplace incentive to deliver satisfactory performance to wholesale customers. Thus, the Commission could determine that no further specific mechanism need be created. If, however, the Commission elects to create a new enforcement mechanism, BellSouth

submits that its plan, the Self Effectuating Remedy Plan (“SEEM”) described in Attachment 2, should be adopted.

49. Under a properly structured measurement plan, performance should be measured to a fairly granular level, and on a monthly basis, for both individual CLECs and the competitive industry as a whole. In other words, the plan should be designed to detect in key areas the failure to achieve what is determined to be an appropriate level of performance. This is exactly what the measurement plan that BellSouth advocates would do. A remedy plan that is appropriate for use with these measures should also apply appropriately-sized penalties to each significant failure. This is what BellSouth’s proposed SEEM plan does.

50. Under BellSouth’s SEEM plan, penalties are automatically paid to individual CLECs (Tier 1 penalties) and to the regulatory authority (Tier II penalties) for the violation of each transaction that falls into a specific measurement category. In other words, there is a schedule of penalties that applies for the violation of each measurement, and which varies from measurement to measurement based upon a reasonable assessment of the magnitude of the particular violation. The penalty amount would apply to each transaction within a measurement category that has been failed. Thus, for example, if an ILEC were required to meet a certain interval in 95 of 100 transactions to achieve compliant performance, but it only meets the interval 90 times, it would be penalized for each of the five transactions by which it falls short. Further, the penalties would be paid automatically.

51. As noted above, under the BellSouth Plan that has been adopted by a number of states, Tier 1 penalties are paid to CLECs and Tier 2 penalties are paid to the regulatory authority. Based upon BellSouth’s experience in the states to date, however, BellSouth believes that if a national plan replaces the state plans, both Tier 1 and Tier 2 type penalties should be

payable to the regulatory authority.¹¹ In other words, both types of penalties would remain in the plan, and both would be payable under the appropriate circumstances described in the SEEM plan, however, both types of penalties would be paid into the Treasury of the United States, rather than Tier I payments going directly to an affected CLEC. BellSouth believes that this approach is appropriate because the purpose of penalties should be to incent the incumbent to provide service in a non-discriminatory manner, not to provide damage payments or other financial compensation or enrichment to CLECs. Having penalty payments available to CLECs as a potential revenue stream encourages them to engage in behavior to maximize penalty payments.¹² BellSouth believes that this type of behavior can be discouraged, while serving the appropriate purpose of the plan, by paying all penalties into the Treasury.

52. The foregoing reflects BellSouth's willingness to consent to the creation of an automatic penalty plan that would be available in addition the existing federal enforcement mechanisms if a national plan is ordered to supplant the state plans. BellSouth is willing to agree to automatic penalties, assuming the penalties that are ordered are reasonable and appropriate to enforce a mandatory national enforcement measurement plan. This agreement, however, should not be construed as an indication that BellSouth believes that the Commission has the authority to order automatic penalties without the consent of BellSouth or other ILECs. It is important to note this distinction because in the performance measurement proceedings that have occurred in a number of states, competitive CLECs have argued to State Commissions that these regulators have the ability to impose automatic penalties over the objections of ILECs. This contention has

¹¹ Presumably, these payments would be payable to the Treasury of the United States pursuant to Section 504.

¹² For example, competitive LECs have made proposals in a number of states for penalty plans that would have the potential to generate billions of dollars of penalties each year . It is

served as the predicate to arguments for the imposition of excessive and burdensome automatic penalties to which BellSouth cannot agree, nor would any incumbent.

53. The States do not have the authority to impose automatic, involuntary penalties, and this Commission lacks the authority as well. Specifically, in each of the enforcement mechanisms mentioned in the *Notice* -- whether forfeiture penalties, penalties paid as part of a complaint proceeding, or penalties pursuant to 271 -- each requires a demonstration that a violation has occurred. In other words, there must be a hearing, evidence must be presented at the hearing and certain determinations must be made. For example, in the case of a Section 503 proceeding, it must be proven that the violation is willful or repeated. Similarly, sanctions under 271(d)(6) can only be imposed after a finding that the incumbent in question has ceased to meet the requirements of Section 271. This statutory scheme is completely incompatible with the notion of having a penalty that would automatically apply if there is any deviation from the standard that is determined to constitute acceptable performance.

54. Given the lack of legal authority for this Commission to set penalties without adhering to the process set forth in the applicable statutes, automatic penalties can be adopted only if they are set at levels to which Incumbent LECs can agree. This should not be difficult since not only BellSouth, but also a number of other RBOCs, have proposed penalty plans to enforce performance measurements, and these plans have been approved by numerous State Commissions. However, BellSouth cannot agree to the payment of automatic penalties in excessive amounts. Moreover, BellSouth will consent to automatic penalties as detailed in Attachment 2 to these Comments only if these penalties replace penalties that would otherwise

difficult to believe that the magnitude of their proposed plans is unrelated to the fact that, under their proposals, they would receive most of this money.

apply at the state level. BellSouth cannot agree to the payment of any penalty that is assessed at the federal level in addition to penalties that are in place under state plans.

D. Scope of Application

55. BellSouth submits that any federal performance plan should apply to all carriers having networks that could be made available to provide local service, to the full extent legally possible. Competition can only fully develop if all carriers, both new and established, are encouraged to make their networks available to other carriers and to maintain appropriate standards for doing so. Over time, as Competitive LECs begin to develop more facilities-based service, they should make these facilities available to other carriers just as the incumbents do now. The standards that apply to the CLEC offerings for interconnection and unbundled network elements should be no different than the standards that apply to the incumbent local exchange carriers. As this occurs, it may well be appropriate to monitor the performance of the service these carriers provide to ensure that they are held to the same standards that have been set for incumbent carriers. At the same time, once the market is fully competitive, there should be no measurement plan (and no penalties) applicable to any carrier. Thus, as a practical matter, any application of the plan to competitive LECs likely would begin at a future date and would be short-lived.

56. In the short term, any national performance measurement plan will likely apply only to incumbent LECs. This plan, however, should apply to all incumbent LECs, absent a specific justification for an exemption. Section 251(f) presents an example of how BellSouth believes this process should work. This section provides for the suspension or modification of the requirements upon incumbent LECs if the carrier (1) has a limited number of subscriber lines, (2) files a petition with the respective state seeking exemption and (3) demonstrates that

certain requirements have been met. Any exemption from a federal performance measurement plan should only be granted by the Commission on a case-by-case basis, based upon a similar showing. In other words, a rural carrier wishing to have such an exemption should be required to file a petition with this Commission to demonstrate that the implementation of performance measures is technically infeasible, economically burdensome or that imposition of the measures would adversely effect users, and that the exemption is consistent with the public interest, convenience and necessity.

III. PERFORMANCE MEASUREMENTS AND STANDARDS

A. The Purpose of A Performance Measurement Plan

57. BellSouth believes that the creation of a uniform national performance measurement plan would be beneficial to both the incumbent LECs and to the competitive LECs. A uniform national plan would allow for consistent measurement and standards from state-to-state, rather than having standards that differ based on the individual judgments of State Commissions. Given the fact that the Act applies equally in every state, it only makes sense that the performance that is undertaken to discharge a carrier's responsibilities under the Act should also be judged by a uniform standard. Further, as stated previously, having a single set of measurements would unquestionably allow for greater administrative efficiency. BellSouth, however, emphasizes, once again, that any national plan must be the only plan required. As will become obvious in the following discussion on the specific measures proposed in the *Notice*, many of the proposed measures are substantially the same as measurements that are in BellSouth's plan and that have already been adopted in numerous states in which BellSouth

provides service. Having national measures that duplicate state measures would constitute unnecessary and burdensome regulation that would serve no real purpose.

58. One of the principal purposes of a national plan should be to streamline performance requirements. The best way to do this is to have a limited number of measurements that apply to critical areas. As the *Notice* observes, there are indeed “hundreds” of measurements that have been proposed and implemented in various states proceedings.¹³ As stated previously, the adoption of plans with so many measures and submeasures has resulted in administrative issues that will, at best, be extremely difficult to address. BellSouth believes that the better approach is to do as proposed in the *Notice*, and begin with a relatively small number of measurements that focus on areas of critical importance.

59. The *Notice* does raise the concern that having a relatively small set of measurements might encourage incumbents to shift discriminatory behavior to areas not measured.¹⁴ Although this is a theoretical possibility, BellSouth believes that this prospect should only be addressed by adding measurements when there is some concrete indication that a problem exists.

60. BellSouth’s experience has been that when “hundreds of measures” are adopted, this occurs because competitive LECs express the view that a less extensive approach will fail to detect discriminatory treatment. The result has been expansive plans that are designed to measure CLEC activity that, as discussed previously, has not occurred. Further, there is no reason to believe that many of these measurements will ever capture any significant volume of competitive activity. Also, even when there is CLEC activity, the current structure of the state-

¹³ *Notice*, ¶ 27.

¹⁴ *Notice*, ¶ 27.

ordered plans can cause a single end result to be measured multiple times, e.g., some measures address an entire process, while others address subparts of the same process. BellSouth acknowledges that there may be certain discrete areas in which additional measurements beyond the twelve proposed in the *Notice* are needed. Again, however, a determination that this is the case must be based on some evidence that there is a need for the additional measure.

B. Proposed Measurements and Standards

61. Of the twelve measurements proposed in the *Notice*, BellSouth has measures in its SQM that are either identical or substantially similar to ten of these measures. In the other two instances, the *Notice* proposes provisioning measurements that BellSouth believes are less meaningful than other proposed performance metrics that would capture the same activity. The measurements in BellSouth's SQM have been implemented by BellSouth in response to previous State Commission orders. Thus, it is clear that these measurements are workable. As discussed more fully below, BellSouth believes that these measurements can be adopted for use as a national plan, and can provide a satisfactory means to monitor performance without imposing an undue burden on any carrier.

62. Although BellSouth believes that the proposed measurements are generally appropriate, in some instances the *Notice* suggests standards that would not be appropriate. Specifically, for a number of standards the *Notice* requests comment as to the appropriateness of a particular benchmark or interval. However, in almost every instance, the appropriate standard for each of the proposed measures is a retail analog. As this Commission stated in its *Ameritech Michigan Order*¹⁵:

¹⁵ *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in*

For those OSS functions provided to competing carriers that are analogous to OSS functions that a BOC provides to itself in connection with retail service offerings, the BOC must provide access to competing carriers that is equal to the level of access that the BOC provides to itself, its customers or its affiliates, in terms of quality, accuracy and timeliness.

63. Further, equivalent access is to be construed broadly, “even if the actual mechanism used to perform the function is different for competing carriers than for the BOC’s retail operations.”¹⁶ Thus, a retail analog must be utilized if one exists. The use of set standards such as benchmarks and intervals to demonstrate that a “meaningful opportunity to compete” has been provided is only appropriate when there is no retail analog.¹⁷ Almost every one of the proposed measures has a retail analog. For these measures, any proposed use of benchmarks and intervals is inconsistent with the standards previously set by this Commission.

64. BellSouth has attached to these comments (Attachment 1), information on the measures contained in its SQM that BellSouth proposes in response to the *Notice*. This information has been formatted to fit the template included as an Appendix to the *Notice*. The information in Attachment one includes, for each measurement, the appropriate definition, exclusions, business rules, levels of disaggregation and standards (either benchmark or retail analog). BellSouth has also included the calculation and report structure for each measurement. BellSouth’s Self-Effectuating Enforcement Mechanism (SEEM) plan, which relates to the specific measures proposed, is also attached (Attachment 2).

65. BellSouth’s specific responses to the twelve measurements included in the *Notice*, and to the questions regarding how these measurements should be structured, are as follow:

Michigan, CC Docket No. 97-137, *Memorandum Opinion and Order*, 12 FCC Rcd 20543, 20618, ¶ 139 (1997) (“*Ameritech Michigan Order*”)

¹⁶ *Id.*

¹⁷ *Id.* at 20619, ¶ 141.

1. Pre-Order Measurement

66. It is appropriate to require incumbent LECs to measure whether their pre-ordering systems provide reasonably prompt response times in a manner that affords competitors a meaningful opportunity to compete. BellSouth's proposed measurement, *Average Response Time and Response Interval (Pre-Ordering/Ordering)* does this by measuring the average time to retrieve pre-order/order information from a given legacy system. The average response time is determined by summing the response times for all requests submitted to the legacy systems during the reporting period and dividing by the total number of legacy system requests for that month. This measure accurately reflects the CLEC pre-ordering/ordering interface response timeliness with clearly defined measurement points and detailed system and data request disaggregation.

67. Only one exclusion is appropriate for this measurement: scheduled system downtime. It is necessary for all Operations Support Systems (OSS) (i.e., both the interfaces and the legacy systems that are accessed) to undergo regularly scheduled routine system maintenance and software upgrades to optimize performance and functionality. The time that is needed to perform maintenance and upgrades should be excluded from the measurement. The incumbent LECs should have the responsibility to notify the users of these systems of any planned outage. In cases where access to these systems is going to be unavailable during scheduled upgrades and routine maintenance, BellSouth posts the system downtimes in advance on the BellSouth web site. This exclusion is similar in concept to the exclusion suggested in the *Notice* for weekends, holidays and hours outside of the normal reporting period. BellSouth performs these maintenance functions during off-hours, weekends and holidays. However, except for scheduled

downtimes, CLECs may perform queries during off hours, weekends and holidays. For this reason it is not necessary to exclude these entire time periods.

68. A parity standard is generally appropriate because a retail analog exists. Specifically, BellSouth retail service representatives and CLEC service representatives access the same OSS for pre-ordering/ordering information. Thus, generally, there should not be a benchmark-type standard that includes a required interval and a percentage of orders to be returned within that interval.

69. At the same time, there is one important difference between an incumbent's access to the system for retail purposes and the access that is provided to CLECs. The OSS must be designed to protect the confidentiality of both individual CLEC information and LEC retail information when accessed by CLECs. For this reason, it is necessary to add an additional 2 seconds to the response time for CLECs, as compared to the response time for BellSouth retail operations. During this additional 2 seconds, the OSS validates the identity of the accessing party and establishes restrictions on the data to which the accessing party is allowed, thus protecting the confidentiality of OSS data, such as customer records. The Commission has recognized that this additional time is appropriate. In the *Bell Atlantic-New York Order*, the Commission held that "our finding that Bell Atlantic processes pre-order inquiries from competing carriers in substantially the same time that it takes to process analogous retail transactions is based on Bell Atlantic's performance data."¹⁸ Bell Atlantic reports pre-order response times based on a performance standard of "parity + 4 seconds," which was established by the New York Commission. The security measures and computer translations in BellSouth's pre-ordering

¹⁸ *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New*